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## Property Law Symposium – Property as a Fundamental Civil Right

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## PROPERTY AS A FUNDAMENTAL CIVIL RIGHT

RICHARD A. EPSTEIN\*

### INTRODUCTION: THE GENERAL AND THE PARTICULAR

Property rights are clearly back on the public agenda as a subject for discussion and debate. In many circles these rights are rightly regarded as fundamental. One familiar statement of the centrality of property rights comes found in *Corfield v. Coryell*,<sup>1</sup> in the context of the Privileges and Immunities Clause of Article IV of the United States Constitution: There, Justice Bushrod Washington wrote that the clause encompassed privileges

which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments. . . . [These rights] may [all be] comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, . . . , [and] to take, hold and dispose of property. . . .<sup>2</sup>

Yet, even though the centrality of property rights has been rightly praised, often there is little appreciation as to what that entails. Indeed often when I lecture on the subject of property rights I am asked to give some hard-hitting adversarial speech in which claims for property rights vanquish everything in their wake. But if those are the expectations here, then I hope to disappoint them. I think that the questions of understanding are prior to the questions of political advocacy or support, and the subject of property rights is a difficult one on which to obtain that clear understanding. Indeed, one sign of the evident complexity of this issue is that people are often hard pressed to articulate what is gained or lost when it is said that property is *not* a fundamental civil right. In order to understand what is entailed by regarding property as a fundamental civil right, it is necessary to describe the variety and richness of property rights; only then is it possible to isolate the features that give property rights their permanent salience and importance.

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1. 6 F. Cas. 546 551 (C.C.E.D. Pa. 1823) (No. 3,230).

2. *Id.* at 551-52. He then qualifies those rights by noting that these rights are "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." *Id.* at 552. This last clause is the soft underbelly of his position, and among its weaknesses is its failure to state which restrictions should may be imposed without compensation, and which require it.

In this article, therefore, I address two major questions. In part one I shall examine what a general theory of property rights has to say about the anticipated shape and variety of property rights in different forms of resources. In particular, I look at two features that I think account for the importance of property rights, their universality and their utility, and show how these relate to the traditional rules of property—acquisition, protection and transfer. Part two then continues this inquiry by asking how the same set of general considerations leads to a wide range of different solutions to the property rights problem as we move away from land and chattels to other natural resources or intangibles, such as information. Part three examines two discrete and important areas of public regulation—land use planning and government regulation of employment markets—in order to show how they are inconsistent with the basic system of property rights (with all its own internal diversity) developed in the first portion of the article.

One conclusion comes clear. Many of the naive theories about the absolute nature of property rights are falsified by common social practices and legal rules in dealing with property rights both for land,<sup>3</sup> and especially after the transition to natural resources, such as water and oil and gas, and intellectual property. But none of the sensible legal adaptations of the standard rules of property come close to offering any justification for the extensive forms of government regulation that are routinely adopted and defended with respect to both land use planning and labor markets. The ideal state may not be as small as some defenders of the nightwatchman state envision, but it is far smaller than the advocates of central government planning propose.

## I. WHY ARE PROPERTY RIGHTS FUNDAMENTAL?

What then are the indicia of fundamental rights? What are the threads that link property rights together notwithstanding their apparent diversity? In dealing with this question, two relevant characteristics require special mention: universality and utility. They are highly correlated.

### A. *Universality*

To call a right fundamental presupposes that it applies across a large number of distinctive settings. The property rights that I shall speak about here satisfy that condition because it is clear that all legal cultures, no matter what their differences, have some conception of property rights. The explanation for the pervasive nature of the institution lies in the fundamental need, apparent across time and cultures, to separate me from thee. It is almost impossible to think of a system of human interactions without a

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3. For an exhaustive discussion of the interrelationship of common and private property in land, see Robert C. Ellickson, *Property in Land*, 102 YALE L.J. (forthcoming Apr. 1993).

system of property rights. Consider, for example, the rules and institutions that would be rendered unintelligible without a system of property rights. There could be no serious claims for autonomy of the person; there could be no actions for trespass or for nuisance; it would be difficult, if not impossible to construct prohibitions against theft, rape and murder. The state of the nature of man was one which Hobbes described as a war of all against all,<sup>4</sup> and the escape from that world is possible only through a robust system of property rights.

There have been of course attacks upon the idea of property from many modern socialists who, drawing on various strains of Marxist theories, believe in the collective ownership of the means of production and regard the abolition of private property as one of the central missions of the state.<sup>5</sup> But in its extreme form this position must fail. No matter how much we wish to separate the means of production from individual ownership, there is a sense in which consumption is always an individual act. In all cultures and societies, rules of property must be developed to decide who is entitled to consume and use what things. That task is squarely faced in common and civil law systems, which for all their differences, do have strong traditions of private ownership. And it must be faced in the more communal structures associated with many African or Indian tribes,<sup>6</sup> and with new colonies established by pioneer groups.<sup>7</sup> The problem must also be faced in modern socialist systems, even if an economy is reduced to ruins by collective ownership of the means of production. There is no similar necessity to have collective means of production, given the inescapable nature of individual acts of consumption. Only in wholly totalitarian regimes will private property disappear without a trace.

In this setting, however, I do not want to speak about the survival of the tag ends of a property system in some alien political environment. Instead I wish to address the question of how a robust system of property rights might be formulated and implemented. The system that I am about to describe has its powerful roots in both the common and Roman law.<sup>8</sup> It meets the test of universality not only because of its capacity to endure, but also because of its comprehensive nature. A well-defined system of property rights contains no gaps, that is, it does not leave open any areas in which the

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4. His most well known exposition on this topic is found in THOMAS HOBBS, *LEVIATHAN* 96-97 (Oxford 1558) (1651).

5. See, e.g., Karl Marx & Friedrich Engels, *The Communist Manifesto*, in KARL MARX: *SELECTED WRITINGS* 232, 237 (David McLellan ed. 1977).

6. See, e.g., MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955).

7. See Ellickson, *supra* note 3, noting the transition from collective to individual ownership in the Jamestown and Plymouth colonies. There was a move from collective to individual ownership of land, prompted by a healthy need for survival.

8. For a summary of the Roman Law materials, see BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* ch. 3 (1962).

legal system cannot reach a principled decision.<sup>9</sup> The system which I wish to describe is not a system of exploitation of one person by others. Quite the opposite, one primary goal of a system of property is to provide islands of independence that allow all individuals to pursue their own projects without interference from others. The system of property rights thus imposes duties upon everyone to respect the correlative rights of others. The trick is to develop a system in which the rights created in the long run are worth more than the correlative duties that are necessarily imposed. How then might this be done?

In order to answer this question we cannot speak indefinitely at a high level of abstraction. It is necessary to descend from these Olympian generalities in order to address the more concrete issues that any system of property rights must address. In particular the system of property rights contains three broad classes of rules, each of which is designed to serve some particular function:

1. Rules of Acquisition. First in any legal system are the rules that determine who becomes the first owner of any property in question. The rules of this sort have to deal with two issues. First, the legal system must provide some rules to determine the ownership of individual persons, given that the question of individual autonomy is not a self-evident or deductive truth. Instead it represents some normative judgment on the desirability of certain institutional arrangements. (Slavery may be an abomination, but it is not a contradiction in terms.) Second, the legal system must supply rules that call for the assignment of property rights in things external to the individual—that is, in various kinds of physical and intellectual resources. Here a legal system cannot simply announce that it is in favor of private property. It must also indicate the ways in which it will *match* up particular persons with particular things. Where a system of private property is adopted, virtually all traditional legal systems have used a rule of first possession (sometimes called the rule of initial occupation with land, or capture with wild animals) to assign particular things to particular persons.<sup>10</sup> This rule solves the *identification* problem in a cheap and efficient fashion, and for many resources, the creation of private ownership increases the chances that the resource in question will be developed in a sensible and

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9. I discuss the comprehensive nature of property rights in RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* chs. 5-7 (1985), and have been attacked mightily

10. The literature on the first possession rule is enormous. The origins of the modern discussion trace back to JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ch. 5 ("Of Property") (1690). See, e.g., RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* (1951); ROBERT NOZICK, *ANARCHY, STATE, UTOPIA* ch. 7 (1974); LAWRENCE C. BECKER, *PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS* (1977); Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

efficient fashion.<sup>11</sup> The rule of first possession also prevents the concentration of all resources in the hands of a single person or even in the hands of a government, and thus leads to the decentralization of power which is generally a precondition for successful democratic government. The rule of first possession has often been attacked as excessively egoistic,<sup>12</sup> but despite its ostensible individualistic orientation, the rule advances overall social welfare in a broad range of contexts.<sup>13</sup>

Although private property may generally offer the preferred solution, and first possession the rule by which to achieve it, there are nonetheless still instances where more complex forms of property holdings, including various forms of common ownership, may be preferred. We cannot assume that all things in the initial position should be subject to private ownership. Indeed any theory of property rights will be inadequate if it only allows for private property. Throughout history, all legal systems have postulated that certain things are not subject to private ownership—the air and the sea, or even the town walls, ordinary language, mathematical theorems. A sound theory of property rights must leave some place for rules of common as well as rules of private ownership. There are cases where the cost of exclusion is high relative to its social benefits.

2. Rules of Protection. The property rights that are acquired are only of value if the holder of these rights is in a position to preserve their use against all comers. Thus there are legal rules to protect the autonomy of the person, to protect exclusive rights of possession in privately owned property, whether land, chattels or intangibles, and to protect the fractional interest that any individual enjoys in property that is held in common. The creation of this tort system is in a sense strictly correlative with the system of property rights. And its importance cannot be underestimated. The rules of trespass and nuisance are for the protection of property interests, and they insure that once the rights in property have been assigned to one person, as by the rules of initial acquisition or (as will be seen) by subsequent transfer, they cannot be taken or destroyed by another individual. Without the system of protection afforded by the rules of tort, there is no stability of expectations in any system of property rights. And without that stability, there will be no investment in useful or productive activities.

The emphasis on the rules of protection in turn raises many of the classical issues of the law of torts. When it is said, for example, that one person is not allowed to take or damage the property of another individual, there is always the question as to how far that protection extends. I am not entitled to break your vase with a hammer, but what if I shake the table on which it rests so that it falls and breaks, or push another person into it, so

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11. See Ronald H. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1 (1959) on the advantages of the decentralized control of the spectrum.

12. See, e.g., Becker & Schlatter, *supra* note 10.

13. So argued for in Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J. L. & PUB. POL'Y 713 (1989).

that again it is destroyed? In other cases, as when I force someone else to undertake dangerous actions, there is some question as to whether harm is caused by me or whether it is self-inflicted, with very different consequences on the question of liability. The range of acts and events that could combine with my conduct to cause harm has to be considered in meticulous detail, and is one of the major issues of the law of torts, usually considered under the rubric of proximate causation.<sup>14</sup> Its details are not our concern here. Indeed a system of property can, and has survived, with some ambiguity on just this type of issue. All legal systems acknowledge some role for the law of torts.

3. Rules of Transfer. There is a third set of rules that are necessary to complete a system of property rights. No economy, no social system should be regarded as static. Oftentimes, property rights are more valuable in the hands of a third party than they are in the hands of their initial owner. Behind the system of transfer is the basic logic of the system of contract law. The state enforces and respects contracts, not because there is some special magic to promises, independent of the consequences attached to their use.<sup>15</sup> Instead when promises are made, the state has strong reason to believe that both parties anticipate gains from trade. It is those gains that lend dynamism to the system, and explain why a strong moral force attaches to the institution of promising. No such instinct would exist if the transfer of property rights by voluntary exchange were thought to be the prelude to their waste or destruction. But once we know that gains do attach to trade, then a legal system should aid, not hinder, the cheap and efficient voluntary turnover of goods and services. The mechanism of contract can aid the process of trade by allowing these exchanges to take place over time. If I can deliver goods today on the enforceable promise of being paid tomorrow, then we both enjoy the freedom to rearrange our affairs over the dimension of time, to our mutual benefit.<sup>16</sup> Credit is therefore a power concomitant of voluntary exchange, as the close connection between the law of sales and the law of personal guarantees and security interests in real and personal property attests.<sup>17</sup>

The gains from the one transaction can be replicated in other similar transactions, and so long as we are confident that strangers to the original

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14. On which, see RESTATEMENT (SECOND) OF TORTS §§ 430-462 (1977). There are many exhaustive surveys of the subject, of which perhaps the best known is H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW (2d ed. 1985).

15. For efforts to bolster up the moral theory of promises, see PATRICK S. ATIYAH, PROMISES, MORALS, AND LAW (1981).

16. See, e.g., Douglas G. Baird, *Self-Interest and Cooperation in Long-Term Contracts*, 19 J. LEGAL STUD. 583 (1990).

17. For some of the complications of this literature, see Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143 (1979); Randal C. Picker, *Security Interests, Misbehavior, and Common Pools*, 59 U. CHI. L. REV. 645 (1992); Alan Schwartz, *The Continuing Puzzle of Secured Debt*, 37 VAND. L. REV. 1051 (1984); George G. Triantis, *Secured Debt Under Conditions of Imperfect Information*, 21 J. LEGAL STUD. 225 (1992).

exchange are not on balance left worse off by them (at which point there is a risk from excessive trade), then we should encourage voluntary exchange across the board, and with it the formation, over broad domains of activity, of a market economy.

Within this basic framework, the rules of transfer have two distinct roles. In part these rules are designed to determine, first whether the interest in question is one that should be transferrable, and second the mechanics whereby transfer of these interests can take place. The system for transfer thus involves the entire law of contract, and also systems of public support, such as recordation, which allows the transfers to take place while giving notice to third parties about the state of the legal title. But as before, we cannot assume that it is desirable for all rights to be separately transferable, even though that might often be the case. The theory in question must recognize that there could be certain cases in which the proper solution calls for inalienable rights, chiefly in those cases where the transfer of property results in an increased risk of harm to third persons.<sup>18</sup> Thus in many instances a tenant is not allowed to transfer his leasehold interest because of the damage that could be done to the landlord's reversion; vendors are not allowed to sell guns to children or incompetents, or perhaps to anyone at all; tavern owners are restricted in the persons to whom they can sell liquor, and the times at which they may remain open for business. In each case the logic is the same: the transfer from A to B creates a risk of serious harm to C, for which a damage remedy against B, after the fact, may offer too little, too late.

### *B. Utility*

The basic system of property rights is fundamental not only because it is comprehensive, but also because it allows resources to reach their highest and best use with the minimum level of friction. In order to understand why, it is necessary to step back from the system and recall the two parts of the Coase Theorem, where we deal with zero and positive transaction costs settings.<sup>19</sup>

#### 1. A Frictionless World

The first half of Coase's argument is that where the costs of subsequent renegotiation are zero, there is no reason to worry about the rules that govern the initial distribution of property rights under the rule of acquisition discussed in section A(1). The rule of transfer in section A(3) could be costlessly applied in order to shift the resources to the person who values them most. The same process can be undertaken an infinite number of

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18. See Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985).

19. See Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).



times, which leads to the optimal reconfiguration of rights regardless of their original location. Protection of property rights under the tort rules in section A(2) is also no problem because it is possible to have perfect enforcement of any system of property rights at zero cost. And perfect enforcement means there will be no violation of the rights in the first place.

## 2. A Friction-Filled World

Subsequent transactions are, however, often very costly which is one reason why questions of initial allocation matter. Where the wrong system of allocation is adopted, subsequent transactions may be blocked. So a question of initial allocation that is regarded with supreme indifference in a zero transaction cost world now becomes an issue of abiding importance. It is necessary to come as close as possible to the ideal assignment of rights in order to minimize the costs of correcting initial errors in allocation.<sup>20</sup> The system of property rights is fundamental because its structure determines the wealth and fortunes of its individuals. Where that system allows for smooth and effective transfers, it will increase its overall utility, regardless of the initial assignment of rights.

### III. THE FORMS OF PROPERTY—BOTH PRIVATE AND PUBLIC

#### A. *The Land Fallacy—Or Should All Property be Held Privately?*

##### 1. Land Again

In sketching the outline of the theory of property, I have thus far stressed the usual trinity of incidents associated with it: possession, use and disposition. The tendency on the part of many thinkers is to follow the example of Locke<sup>21</sup> and to assume that all property rights should assume this form, and that all things, subject to ownership, should be taken out of the commons as quickly as possible by one distinct owner who can use or exchange that property, whichever yields him the higher value.

The classical conception of property thus gives to its owner three attributes, exclusive possession, exclusive use and full rights of alienation by sale, gift, will and the like.<sup>22</sup> In addition, rights of land tend to be defined comprehensively in that they cover more than the surface of the land, but include air and mineral rights as well. The common law maxim is, *cuius est*

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20. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Alienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1096-97 (1972).

21. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Book II, Chap. 5 (Peter Laslett ed., 1988) (3rd ed. 1698). There are of course communitarian strands in Locke that require extended evaluation, on which see Laslett's introduction, *supra* at 102-09.

22. This conception dates back to Roman times. See FREDERICK H. LAWSON & BERNARD RUDDEN, THE LAW OF PROPERTY 8-9 (2d ed. 1982).

*solum euis est usque ad coelum et usque ad inferos*—so that possession of the land extends from the center of the earth to the heavens.<sup>23</sup> For land this regime is generally a desirable one in that the rule of acquisition thus gives each plot of land clear boundaries and a single owner capable of using or trading the property, as the case may be. But here too one must be careful because the common law rules on boundary disputes are often more complex than this simple model would apply.<sup>24</sup> For example, neighboring owners of land are usually subject to reciprocal easements of support, so that no one can dig out to the boundary if his neighbor's land will fall in.<sup>25</sup> The reciprocal nature of these easements is not designed to create a form of collective ownership, much less socialism, in land. Instead the creation of the easement comes from the recognition that support rights (a) are generally worth more than they cost, and (b) they are very difficult to negotiate consensually when individual plots of land can have multiple neighbors. It is the positive transaction cost environment that shifts the law away from the very austere systems of private property into more complex systems. And this shift is a good thing so long as the deviation from the system of absolute rights satisfies conditions (a) and (b).

Further deviations from the system of private ownership also have to be considered. One important illustration involves agricultural societies, especially in uncertain times, where holding land in commons may be preferable to private ownership. Common ownership does not create a free-for-all, for membership in the commons can be strictly limited, and the practices of members to the commons strictly regulated. In addition, common ownership may be preferable to strict private ownership where the risk of crop failure is high, and diversification of holdings provides some insurance against starvation that follows from a wipeout. The medieval system of open or common fields gave each owner access to small portions of several different tracts of land. In so doing it increased the cost of operation relative to a single set of concentrated holdings.<sup>26</sup> But that

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23. See *id.* at 21. Lawson and Rudden note that, even for agriculture, land only has value in three dimensions. The problems with this rule arise most acutely in the cave cases, where the entrance to the cave may be on the land of one person, and the entry on the land of another. See for that situation, *Edwards v. Sims*, 24 S.W.2d 619 (Ky. 1929), awarding ownership to the surface owner who does not control the mouth of the cave. For extended criticism, see Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 35 J. L. & ECON. (1993)(forthcoming).

24. On cost of policing boundaries, see Ellickson, § B.1, *supra* note 3.

25. See RESTATEMENT (SECOND) OF TORTS §§ 817-821 (1977) for an elaboration of the rules. For an insightful analysis, see *Corporation of Birmingham v. Allen*, L. R. 6 Ch.D. 284 (Ch. App. 1877) (Jessel, M.R.).

26. See the excellent study CARL J. DAHLMAN, *THE OPEN FIELD SYSTEM AND BEYOND* 4-8, 21-23 (1980), which rightly looks for efficiency explanations that can explain the existence of both common (for grazing) and separate properties (for crops) at the same time, and which attempts to correlate the shifts from open fields with shifts in both costs and demand. His explanation dwells heavily on transaction costs. The open or common fields (common only to the members of the village, as all others were excluded) were used for cattle grazing, where large tracts were needed, and the costs of negotiating separate licenses for each entry were

diversification did provide a benefit in bad years, because it reduced the great risk of death from famine. The systems of landholdings were responsive to the risks at hand. Indeed there are some cultures in which land will be operated in common when some crops are grown, but operated privately when other crops are grown in other seasons. The common ownership, sanctioned as it is by custom should be viewed very differently from state collective ownership, which is doubtless far less efficient in its operation, if only because it does not respond to the diversification problem.

## 2. Oil and Gas

The system of property rights in land must be applied with caution for other reasons as well. As noted above, the initial rule of allocation is one of first possession, which seems to work as well with land as any other. Nonetheless one weakness of this rule of initial acquisition has always led to a certain uneasiness, even with respect to land: what about the position of those who lose in the race to acquire first possession? In part the answer is that these persons will gain through voluntary exchange with persons who have acquired by first possession. But in other cases the concern with the outsiders is still more insistent. In dealing with such resources as water, or oil and gas, there is a genuine concern that the use of individual rules of acquisition will destroy the value of the very resource that persons want to reduce to private ownership.

For oil and gas the story has been told many times.<sup>27</sup> A rule that encourages surface owners to drill for all the oil they can get will lead to excessive investment in wells. Individual owners will drill by the edges of their plots in order to siphon off oil and gas from under their neighbor's land. The efforts one party undertakes will be countered by similar efforts of others, and much of the value of the field could be destroyed by these individual acts, thereby disturbing the geological layers of oil and gas. In some instances, voluntary contracts could lead the various owners to stay their hands, but often (when the number of surface owners exceeds about five) there will be abiding disagreement as to which owners should be entitled to what percentage of the oil.<sup>28</sup> A system that moderates the first possession rule and requires the owners to pool their resources may well be preferred to the individualistic rule. The case for first possession rules is thus weakened by the striking negative externalities that it creates. Now the

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prohibitive. Arable land could be divided into smaller spaces because there were no gains to shared uses. *Id.* at 7. See also J.A. YELLING, *COMMON FIELD AND ENCLOSURE IN ENGLAND 1450-1850* (1977).

27. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 219-23 (1985); GARY D. LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* 93-114 (1989). For a case law account of some of the developments, see *Hammonds v. Central Kentucky Natural Gas Co.*, 75 S.W.2d 204 (Ky. 1934).

28. Gary D. Libecap & Steven N. Wiggins, *Contractual Responses to the Common Pool: Prorating of Crude Oil Production*, 74 AM. ECON. REV. 87 (1984).

often intractable coordination problems among the surface owners call for some purposive change in the ownership rules, and incline us to some collective solution, such as well-spacing regulations or unitization systems that limit the amount of drilling that any owner can do on his own property.<sup>29</sup>

### 3. Water Rights

At the time when private ownership was unquestioned for land, water rights were often held in common.<sup>30</sup> All riparians were entitled to make limited use of the water from the stream; all had to reduce their take pro rata in the event of scarcity; none could exclude others from fishing their portion of the river; navigable streams could be used by the public at large without the consent of the individual riparians. This complex system of private and collective rights is best explained by looking at the positive transaction costs model.<sup>31</sup> Given the basic knowledge that one has of water in a country like England, one must inquire which system of property rights is likely to maximize the value of in-stream (e.g. fishing) and out of stream uses of water (e.g. drinking). The proof of the proposition is that these property rights do not survive in other physical environments. More intensive instream uses were subsequently allowed in America once mills become a viable source of power, and the entire system of appropriation shifted to first come, first served in the American West when the riparian uses of the water are of little value. In Hawaii the local customary law is different still, to reflect the dominant fact that water flows, not in ordinary rivers, but down discrete paths from the top of the mountains.<sup>32</sup>

The variation in systems of property rights, each attuned to its own location should be the source of both confidence and caution. There is good reason to believe that *some* system of property rights is critical in all social settings. But at the same time, it is clear that there is no single permanent set of property rights in water that is good for all occasions. The variation is greater than commonly supposed by many property rights supporters, but for reasons that depend on increased value of use, and not income or wealth distribution.

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29. Discussed at length in CHARLES DONAHUE JR., ET AL., *CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* 325-59 (1974).

30. RESTATEMENT (SECOND) OF TORTS, ch. 41, topic 3 scope note and introductory note (1977).

31. See, e.g., Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261 (1990).

32. *McBryde Sugar Co. v. Robinson*, 504 P.2d 1330 (Haw. 1973); *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985).

### C. *Other Forms of Common Ownership: Property Rights in Information*

It should be evident to us all that the form in which wealth is held has changed radically in the present century. Whereas once land and physical assets were the dominant form of wealth, today they have a new competitor—information. If Boeing Airlines represents the giant of the last generation, Microsoft Corporation represents a colossus of the present generation. Its assets are largely intangible and consists of know-how, trade secrets, patents, copyrights and the like. This rise of information as a source of wealth places new strains on the system of property rights, for the standard rules applicable to land often work very poorly for information. In dealing with land the dominant metaphor comes from agriculture: no person should reap what he has not sown.<sup>33</sup> The point of the metaphor is that no one will sow crops where others are able to exclude him from the harvest. The protection of property rights at the time of harvest is therefore necessary to incur the investment at planting time and before. Only exclusive rights in the produce of labor will induce that labor in the first place.

With information the situation is more complex. Quite simply, the ordinary right to exclude comes at a far greater cost than it does in the land situation. Information, once produced, can be reproduced quite costlessly. Hence the metaphor of reaping where one has not sown does not have quite the bite that it does in the agricultural system where it first arose. With agriculture, only one person can reap, and a rule that entitled the sower to reap was necessary to insure that a person earned a return on his initial labor. But with information, many people can reap at the same time without destroying the value of the information. Here the tradeoff between the incentives to produce and the ability to disseminate information that has already been produced are much more acute. A rule that grants the initial creator exclusive rights will produce more information. But the information will be of less overall social value because some people will be excluded from using it, even though the cost of their use is very low, perhaps close to zero. The reason for the exclusion is that the creator of the right will insist upon payment for its use, where the payment will be above its marginal cost—given that the information has already been created. There is, therefore, an inescapable dilemma in this area of property rights. In order to increase the likelihood that new information will be created, it is necessary to reduce its value once it is created.

The entire system of property rights tends to show the uneasy compromise between these competing goals. In some cases there is no protection

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33. See for its use in the context of intellectual property, *International News Serv. v. Associated Press*, 248 U.S. 215 (1918). The metaphor is discussed in Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411 (1983); Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 112-117, 122-23 (1992).

at all. Persons use a language freely without paying others who have invented the terms that have increased its richness.<sup>34</sup> Mathematical theorems and proof are usually in the public domain. The inventor of the number '0' received no cash payoff for his great innovation, much less a licensing fee each time the digit is used. A similar fate befell the inventor of Arabic numerals. A system of private property rights in ordinary language would so Balkanize exchange that we would all be the worse off for it. Far better it is therefore to use the system of awards to note those who have made contributions above and beyond the ordinary. One obvious source of gain is employment opportunities at prestigious universities, and another is prizes and honors of which the Nobel Prizes are perhaps the most conspicuous examples.

In other cases the protection afforded by the legal system is partial but not absolute. The systems of patents and copyrights both start with the assumption that infinite protection of the covered invention or writing is too excessive, largely because of the future uses that it excludes.<sup>35</sup> Yet both systems desire to preserve the incentive to innovate and therefore give some protection at the front end. The duration of the protection tends to differ, with longer periods rightly given to copyrights than to patents, on the theory that a given work of art is likely to be unique, while an invention is normally something that other individuals will be able to develop in the fullness of time. One could quibble about the optimal length of the protection period, but for these purposes the critical point is this: With land the ideal period for ownership is infinite, so that there are no complications that arise at the expiration of some arbitrarily defined term. But with information, the total exclusion for an indefinite period, however appropriate for land, comes at too high a price and legal systems everywhere make adjustments to that fact; of which the most important is perhaps the term limitations for patents and copyrights.

The right of publicity—which protects the ability of a person to use his name or likeness for commercial success—also shows a similar ambiguity.<sup>36</sup> These rights are profitably analyzed along two separate dimensions: Time and use. On the first issue, the temporal dimension, these rights are normally well protected during life, so that one person is not allowed to exploit the name or likeness of another for commercial advantage. Yet there is a genuine ambiguity as to whether the right of exploitation survives death.<sup>37</sup> The cases tend to be split on the matter because the same tradeoff arises. The ability for exclusive commercial exploitation during life is a

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34. See, for discussion, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332-33 (1989).

35. *Id.* at 361-63.

36. See RESTATEMENT (SECOND) OF TORTS § 652C (1977).

37. See, e.g., *Factors Etc., Inc. v Pro Arts, Inc.* 579 F.2d 215 (2d Cir. 1978) (recognizing right); Cf. *Memphis Dev. Found. v. Factors Etc. Inc.* 616 F.2d 956 (6th Cir. 1980) (opposing recognition of the post mortem right).

large incentive to develop specific traits that are desired by others. Yet the insistence of the license cuts off the use that others might make of that name or likeness. Is the effect on incentives so great to justify keeping the exclusivity after death? Here again there is a split of authority in the cases, one which fully reflects the close empirical question that underlies the choice.

Similarly these property rights in names and likeness are restricted to commercial exploitation, which again reveals the qualified character of the property right.<sup>38</sup> It is not as though no person is allowed to mention or to criticize, or report on, the affairs of another individual without his consent.<sup>39</sup> Gossip about public figures is done without leave. Book reviewers do not have to obtain permission of the author before they damn or praise his work, and politicians, entertainers and others who choose to enter the public eye cannot insist on monopoly control of their name or likeness in the ordinary press. This middle position is again based on sensible empirical compromises. The public tends to lose if criticism and commentary are stifled, but there is no corresponding public interest in allowing commercial exploitation by strangers, where there is no incentive to build or tear down reputations as the case may warrant: whatever name-value the individual acquires or maintains, it is his to sell if he chooses.

The common law has also developed, but only in qualified form, property rights in news stories that have been acquired by labor.<sup>40</sup> Normally these stories are protected, even when the copyright laws are inapplicable or of no assistance, so that one paper cannot lift a rival's story for its own use. But the same body of law allows anyone to read the stories in other papers for leads that it then may investigate independently. Here the prohibition applies only to direct competitors, but does not restrict subsequent users from making use of the stories so published in their own work, even if it is for commercial use, so long as the copyright law is not interfered with.<sup>41</sup> Again the accommodation is an imperfect, but necessary effort to trade off between the gains that property rights create (the incentive to search for information) from the losses that they impose (the restrictions on use that any price system necessarily imposes).

#### IV. PROPERTY RIGHTS, LAND PLANNING, AND SOCIALISM

##### A. *Common Property Rights Do Not Call for Government Control*

In dealing with the various permutations of property rights, I have indicated that there are many settings in which common property is

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38. See, e.g., *Tropeano v. Atlantic Monthly Co.*, 400 N.E.2d 847 (Mass. 1980).

39. *Anderson v. Fisher Broadcasting Co.*, 300 Ore. 452, 712 P.2d 803 (1986).

40. *See International News Serv. v. Associated Press*, 248 U.S. 215 (1918).

41. *United States Golf Ass'n v. St. Andrews Sys., Data-Max Inc.* 749 F.2d 1028 (3d Cir. 1984).

preferable to private property, and still other settings where a mix of common and private property seems best. In setting out that conclusion, it is important to remember that there is a critical difference between common property and property that is subject to government ownership and control. Thus, when one says that mathematical theorems are common property, he does not mean that the government as the representative of the people is permitted to determine who may use those ideas and who may not. It only means that all persons can use those ideas, without payment to anyone else, whenever they please. Similarly when patents and copyrights give limited use to private owners, they do not contemplate any direct system of government ownership or control of inventions or writings. Instead the understanding is clear that, within the limited domains of time and use specified by the law, the owner of the patent or copyright can exclude, develop, license or sell the protected interest in whatever way he sees fit. By the same token when matters covered by a patent or copyright fall into the public domain, they do not become subject to government ownership. As with ordinary language and novel phrases they become part of the public domain: any person can use them as he or she chooses, no questions asked, and no permissions required.

Any full account of property rights as they have developed at common law and by statute in a market-driven society thus recognizes a level of variation that is far greater than one might suppose from looking at the rules of land and chattels, where exclusive and infinite rights are the order of the day. It is therefore important to note that the variety in these property rights should not be understood as an open license for the state to redefine property rights in ways that vest the ownership of resources in government instead of individuals. A couple of points should be made.

*B. Property Rights to Reduce Bargaining Difficulties:  
Land Use and Land Use Planning*

The many forms of property rights that are observed for different resources are developed with a single end in view: to minimize the bargaining difficulties that could stand in the way of efficient deployment of property rights. The point is of great importance in one of the most controversial topics in Washington state (where this lecture was first delivered) and through much of the nation. It concerns the aggressive effort to increase land use controls through zoning and other forms of government permits and restrictions.<sup>42</sup> All laws of this sort have the unfortunate consequence of creating regrettable stalemates. The state is not allowed to occupy or use the land, but the owner can use it only if he obtains govern-

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42. For a collection of relevant materials, see ROBERT ELLICKSON & A. DAN TARLOCK, *LAND-USE CONTROLS: CASES AND MATERIALS* (1981).



ment approval. The government has no use rights, but virtually unchallenged veto rights.

This distribution of power between owners and government in the land use context has the unhappy consequence of creating a bilateral monopoly situation in which protracted negotiations and bitterness are the order of the day. The individual must obtain the concurrence of the state to move forward, and there is little check on the reasons why the permission to develop will be granted or denied. The system of land planning is a form of socialism in microcosm. Such a system is based on the idea that all use rights are not held by individuals, but are subject to veto and control by the state. The inefficiencies of central planning have been clearly revealed by the failure of socialism to satisfy the wants of its people everywhere that it has been tried. There is no reason to believe that it will, or can, work better when applied to the limited domain of land use. One can have systems that control against pollution and other forms of nuisance without embarking on a system of comprehensive land use planning and control.

Oftentimes this system of extensive regulation is justified on the ground that landowners do not take into account externalities—the harms that their own actions cause to neighbors.<sup>43</sup> No one doubts, given the concern with the protection of property through the tort law, that ownership of property does not confer the untrammelled right to do with it what one pleases. It hardly justifies murder to say that the killer bought the bullet from its true owner. But there are other situations where the claims of externalities are stretched, to say the least. One important issue concerns the question of habitat. A person owns land which serves as a valuable breeding ground for an endangered species, or a watering hole for migratory birds. The landowner may entertain development that could hamper the access that natural species has to the land.

It is commonplace among environmentalist to say that the use of this land by natural species is sufficient to prevent the development of the land because of the external harms that might thereby be caused.<sup>44</sup> But here, in effect, the argument is that the wildlife has an easement of sorts over the land in question, although it is never clear where that easement comes from, or how it is created. The better view of the subject is to recognize that habitats have value, and then for that state to *pay* the owner of the land if it desires these to be preserved. One desirable effect is that landowners will no longer be loath to discover that their own land has some valuable attribute that others desire, for they will no longer find that the value of their own interest in the land will shrink as the social value of the land improves. The government budgets that are today spent on endless amounts of environmental litigation could be directed to the cheaper purchase of the necessary

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43. Starting with *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

44. Geoffrey L. Harrison, *The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings*, 58 U. CHI. L. REV. 1101 (1991).

property interests from owners who should, if the price is right, be only too happy to sell. And the government, if faced by the price requirement, will scale down its demands, and relent on the extravagant demands that it too often makes. The current attitude is that all good things should be obtained by coercion. The more sensible attitude is one that creates these interests by purchase.

But it seems that there is little to hold back the tide of impending regulation. The difficulties with zoning, planning and litigation might lead the disinterested and pragmatic observer to reevaluate the success of the current policies. But instead the recent trends have been to expand the range and ambition of the planning process. In Washington state, for example, the major controversies are over the proper strategies for the implementation of the Washington Growth Management Act (GMA).<sup>45</sup> As the first word of the statute applies, Growth Management is to be done at the state as well as at the regional or local level. The introduction of a second (or perhaps) third layer of bureaucracy can only increase the costs of the operation. Listening to the comments about the Growth Management Act in Washington state, I am impressed with the inability to identify the level of government which should be held accountable in any given case.<sup>46</sup> The local governments all protest that any restrictions on use that they impose are not their fault, because they act under a mandate from the state government which requires extensive planning on their part.<sup>47</sup> But the state says that it only creates guidelines and leaves local governments a fair degree of freedom. And all branches of state government will argue that their land use restrictions are redundant if some federal environmental statute is involved.

This system creates massive dislocations for individual owners. One common complaint that I heard was that the federal government will not examine its restrictions until all clearances for development have been granted at the state level.<sup>48</sup> A system of multiple vetoes has thus arisen in the area of land use development and management. If all government agents were regarded as private tortfeasors, then the rule of joint and several liability would hold each responsible for the entire loss, and leave it to the various levels of government to battle it out among themselves once the compensation is paid to the aggrieved landowner.<sup>49</sup> But owing to the presumption of good faith of all regulators, no one is forced to shoulder the responsibility, as each regulator is allowed to hide behind the actions of the

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45. WASH. REV. CODE ch. 36.70A (1991).

46. *See, e.g.*, WASHINGTON STATE GROWTH STRATEGIES COMMISSION, A GROWTH STRATEGY FOR WASHINGTON STATE (Sept. 1990) [hereinafter GROWTH STRATEGIES].

47. *See id.* at 4. ("Local, regional and state planning must be strengthened and coordinated.") Note the impersonal passive, which ignores the question of who should do the work, or how it should be financed.

48. The comment was made repeatedly in the discussion session after I had given the original version of this talk.

49. *See, e.g.*, American Motorcycle Ass'n v. Superior Court, 578 P.2d 899 (Cal. 1978).

other. If the purpose of a system of property rights is to facilitate use and to facilitate voluntary transactions, the systems of social control here are sadly wide of their mark.

The question is whether one can find any intelligent social policy that justifies the administrative pyramid and buckpassing that is created. Even if we take as given that property may assume protean forms to respond to the externality and coordination problems that were discussed above, it is unlikely that this complex system regulation will pick these out, or, if it does, correct them. There is no effort to single out cases in which pollution or similar problems are likely to cause damage at locations far removed from their sources. There is no recognition that the owner of land will in the first instance bear the costs, and obtain the benefits, of decisions made on land use allocation. And there is no recognition that landowners will therefore have better (not perfect, but better) incentives to make sound decisions on resource use and development than any ponderous and remote planning process.

Even a casual peek at the policies behind the Washington GMA suggests that the implementation of any consistent growth plan is far more likely to create massive shifts in wealth within and across regions and locales than it is to prevent any tort-like injury. Indeed the long list of objectives that government at all levels are supposed to take into account—environmental quality, historical preservation, open spaces, critical habitat<sup>50</sup>—gives sufficient discretion to allow any decision to be made in any case, leaving individual landowners and firms wholly uncertain as to their rights, and wholly unprotected against the pervasive risk of favoritism and faction. Nor is there any recognition that these ends on any wish list may well be inconsistent with each other, and with the capacity to maintain the economic prosperity needed to generate the wealth on which the success of these programs ultimately rests. One virtue of the market system is that land use changes when the relative value of use continues to change. But the supporters of Washington GMA take quite the opposite tack, and think that shifts in land uses cause only losses, without creating offsetting gains for the persons who buy the lands in question.<sup>51</sup> One consequence of this view is a categorical support for the *status quo* that requires “all regions of the state prevent growth and development from encroaching on identified agricultural and forest lands.”<sup>52</sup> The jockeying for deciding which lands will be kept growth free and which will not will create enormous political struggles, and the utter unwillingness to pay compensation to owners of restricted lands will only convert these political struggles into knock-down drag out fights.

Similar problems will be created in urban areas. For some reason the supporters of Growth Management regard the separation of cities as a goal

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50. GROWTH STRATEGIES, *supra* note 46, at 4-5.

51. *See id.* at 8.

52. *Id.*

to be achieved at great cost.<sup>53</sup> Their proposals will result in certain lands being off limits to construction. Similarly, there is some unexamined assumption that high concentrations of individuals in small regions will reduce the cost of providing a suitable infrastructure<sup>54</sup>—as if the marginal cost continues to decline indefinitely regardless of the population densities. Having created innumerable obstacles to normal construction, the supporters of Growth Management then announce their support to a new set of subsidies for moderate and middle-income home ownership, and propose the use of home equity loans to allow the state to recover its subsidies at some later time—creating further incentives against property improvement.<sup>55</sup> But the subsidies awarded in one breath are taken away by a set of excise and sales taxes in the next.<sup>56</sup> There are of course no concrete ways to authorize this massive level of state involvement—only general exhortations that some “processes” be found. At all points there is, however, an undefended conviction that the ultimate distribution of housing and industry can be rigged from the center without the information about relative uses that can be supplied by market mechanisms.<sup>57</sup> There is far too great a confidence that government can determine outcomes and no appreciation of how the definition and delineation of property rights allows persons to make better choices on their own. The net effect will be to induce people to flee to other

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53. *See id.* at 7.

54. *Id.* at 10.

55. *See id.* at 29-30.

56. *Id.*

57. *See, e.g.,* proposed amendment 1.2:

Growth within urban areas. Urban areas should be humane and attractive, culturally diverse and economically vital. Urban areas should be compact, have concentrated employment centers, and provide opportunities for people to live in a variety of housing types close to where they work. Plans should ensure an adequate supply of land for jobs and housing. Development densities should be sufficient to preserve open space, promote affordable housing and transit, and ensure efficient use of infrastructure. New development should be designed to respect the planned and existing character of neighborhoods. Open spaces and natural features should be preserved and public parks should be provided within urban areas.

GROWTH STRATEGIES, *supra* note 46, at 20.

The comparisons to the defunct Soviet Constitution are irresistible:

*Article 44.* Citizens of the USSR have the right to housing.

This right is ensured by the development and upkeep of state and socially-owned housing; by assistance for co-operative and individual house building; by fair distribution, under public control, of the housing that becomes available through fulfillment of the programme of building well-appointed dwellings, and by low rents and low charges for utility services. Citizens of the USSR shall take good care of the housing allocated to them.

The major difference between the old Soviet and the Washington State proposals is that the latter is far more interventionist than the former, given their willingness to exert control over the layout of towns and communities, and the pattern of land use and transportation everywhere.

jurisdictions, or not to enter the state at all, because of the onerous nature of the burdens in question.<sup>58</sup> No defects in the ordinary rules of private property justify so grotesque a program of central planning.

### *C. Labor Markets*

The mistakes that are made in land use contexts are often carried over to labor markets, with equally little justification. The great strength of competitive labor markets is that freedom of entry and exit reduces the complicated bargaining games that otherwise take place. But the various forms of government regulation of labor markets make doing business in this context as bizarre and complicated as land development. The labor statutes, which impose collective bargaining on workers and firms, only *complicate* bargaining difficulties by creating monopoly power on both sides of the market, leading to excessive bargaining costs, and in the end bargaining breakdown that too often manifests itself in lockouts and strikes.<sup>59</sup> Similarly, various systems of price and rent controls, or of minimum wages, generate both shortages and queues as prices are not allowed to rise, or wages allowed to fall, to market clearing levels.

It is possible to take the critique further. The modern civil rights laws, which all take as their central proposition that it is improper to refuse to do business with another person on certain forbidden grounds: race, sex, ethnicity, age, handicap, and the like, are in fact the very antithesis of civil rights as that term has been used here.<sup>60</sup> The conception of civil rights that I defend is one that speaks about the capacity to own and acquire property, and to contract for its use and disposition. These are rights held by all persons in the original position, and ones on which government should not be allowed to tread. The modern civil rights laws should be understood as collective and misguided efforts to limit the normal bundle of rights associated with property, without identifying any of the problems of bargaining breakdown that might justify a different form of property rights, such as those reviewed above. The net effect of these laws is to expand enormously the scope of government power and control in ways that allow faction to dominate public and private lives, at enormous cost to both liberty and efficiency, which are here so closely entwined.

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58. See, e.g., letter from Forrest G. Coffey, Vice President for Governmental Affairs, Boeing Airlines to Tim Hill, Executive, King County Washington (May 26, 1992) (on file with California Western Law Review) (explaining the adverse consequences of the act on the firm and its ability to obtain housing for its workers, and that the new Boeing testing ground will be in Montana).

59. See Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L. J. 1357 (1983).

60. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

## CONCLUSION

It should be evident that I am sharply critical of modern legal innovations in both labor and real estate markets. The power of that critique, I believe, is strengthened because it does not rest on any belief that property rights should be absolute as a matter of divine or natural right. Quite the opposite, the approach that I have taken here is to explain why deviations from the ordinary rules governing land and labor are perfectly appropriate in a number of very important institutional settings. But once it is understood why these resources require adjustments of the simpler common law rules applicable to land and labor, it becomes clear that *none* of the reasons that justify the complex system of government control for oil and gas, or water, or information, carries over to the core cases of land and labor, which are today .

In dealing with property as a fundamental right, then, the relevant consideration often is not the form that the right takes, be it absolute or qualified, but the shrinkage of the government role in making decisions as to how resources will be used, or at what price they will be traded. The system of decentralized control is necessary to limit the scope of arbitrary government power, and to generate the information, through prices and through private investigation, as to what resources are worth and how they should be deployed. It is not necessary to believe that all rights are created in nature in order to defend private property against attacks from ever more aggressive schemes of public regulation. The utilitarian considerations that are often used to attack the institutions of property are, when properly understood, one of the bulwarks of its defense.

There is today in this land a great uneasiness about our social and economic future. There is a discontent with the current state of affairs, but no clear agreement as what should be done to alter the situation. We are told time and time again that what we need is better government, more responsive government, more enlightened government, more caring government. The emphasis is always on *more better*. I hope that this analysis of property rights shows the error in these proscriptions, even after we take into account all the nuances of the common law theories. But speaking globally, the conclusion is too clear to require extended comment: Given where we are today, we need *less* government and wider spheres of individual autonomy.

